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Congress of the United States
House of Representatives
Washington, DC 20515–2107

September 23, 2011

The Honorable Fred Upton
Chairman, Committee on Energy and Commerce

The Honorable Cliff Stearns
Chairman, Subcommittee on Oversight and Investigations

Dear Chairmen Upton and Stearns:

I write to express my concerns regarding assertions that the Department of Energy (DOE) acted "illegally" when it restructured the loan guarantee provided to Solyndra in efforts to avoid bankruptcy and liquidation as was stated in a press release issued by Congressman Stearns on September 14, 2011[1]. There are many legitimate public policy considerations that Congress should explore regarding the full suite of the Department's loan guarantee programs. Among those should be a recognition of the fact that the authority to subordinate the taxpayer interest behind that of private investors' in the event of bankruptcy or liquidation was strongly advocated for by the nuclear industry and adopted by DOE in an open regulatory process. I urge you to commence hearings into the implementation of the nuclear power plant loan guarantee program, including the conditional loan guarantee already awarded by DOE to Georgia Power Company. Those hearings could also enable the Committee to examine the manner in which the nuclear industry was able to convince policy-makers to alter the subordination requirements associated with these loan guarantees.

As you know, DOE's authority to provide loan guarantees for energy projects originated in the 2005 Energy Bill. The Title was offered for consideration by then-Senator Domenici, and was enacted into law despite my failed amendment to strike it in its entirety on the grounds that it provided unnecessary subsidies to some of the wealthiest companies in America. In its press release[2] on the bill's enactment, Skip Bowman, then President and CEO of the Nuclear Energy Institute, stated that "As a result of this legislation we have many of the tools necessary to move forward to new nuclear power plant construction in this country."

However, Congress and the nuclear industry soon grew both critical and impatient with DOE's implementation of the provisions. At an April 24, 2007 hearing of the Energy and Air Quality Subcommittee entitled "Implementation of EPACT 2005 Loan Guarantee Programs by

[1] http://stearns.house.gov/index.cfm?sectionid=134&itemid=1891
[2] http://www.nei.org/newsandevents/brightfuture/

the Department of Energy," lawmakers voiced their concerns unambiguously. For example then-Congressman J. Dennis Hastert pointed out that:

> "after 20 months, no loan has yet to be guaranteed. That is too long.... Second thing is if your administration was involved in World War II and it was 20 months before any decision was made at all before we made a decision on what we were going to do in the D-Day invasion, we wouldn't have ships, we wouldn't have tanks, we wouldn't have anything to move forward with. I think what we are trying to do on energy independence and energy security in this country not quite lines up with World War II, but it is pretty important and I think your agency has been sorely lacking in making progress."

Hearing witnesses also expressed their concerns with a variety of loan guarantee pace, funding and implementation decisions made by DOE. Among those was the question of whether DOE should ensure that taxpayers' interest in any loan guarantee was primary, or whether it could be subordinated to the interests of private investors'. Christopher Crane, Senior Vice President, Exelon Corporation and President and Chief Nuclear Officer, Exelon Nuclear, stated in his testimony that "the requirement in the DOE Guidelines that any commercial debt must be subordinate to the guaranteed debt will significantly restrict the interest of commercial lenders and the availability of financing for the program, especially in view of the size of the projects."

Other companies also endorsed this view. On July 2, 2007, Constellation Energy, NRG, Entergy and Exelon sent a letter to DOE on this topic[3], stating that "DOE has the statutory discretion to consider alternative arrangements, rather than insisting upon "superior rights" when such property is co-mingled to serve as collateral with other property (financed with guaranteed debt) that is necessary to complete the project."

Additionally, at the July 26, 2007 Senate Budget Committee hearing on the nomination of Congressman Jim Nussle to be the Director of the White House Office of Management and Budget (OMB), then-Senator Pete Domenici raised the pace and problems associated with DOE's implementation of the loan guarantee program:

> "But OMB has been dragging their feet and I do not know which cabinet members have been involved. I surmise as of now the Secretary of Treasury is himself involved. But I can tell you, Mr. Nussle, that this is one of the most important provisions of the Energy Act. It should have already been done and it should have had $25 billion to $30 billion in the loan guarantee fund. It is still not ready and the recommended amount by OMB is $9 billion. That will not fly...It seems to me all the work that has been done, you have got about 48 hours, to sit down and get this fixed."

On August 2, 2007, Senator Domenici lifted his hold on Mr. Nussle's nomination[4] and voted to confirm him after receiving "a commitment from the Office of Management and Budget

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[3] See http://www.regulations.gov/#!docketDetail;D=DOE-2007-0002

[4] http://www.ombwatch.org/node/3389

to fulfill the vision of Congress with regard to the Department of Energy loan guarantee program.[5]"

On October 4, 2007, DOE released its first set of regulations to implement the loan guarantee program, and on June 30, 2008 it began to solicit applications to provide loan guarantees for nuclear power plants. However, these regulations did not satisfy all of the proponents of the program. On February 12, 2009, the Senate Committee on Energy and Natural Resources held a hearing on the loan guarantee program, at which Marv Fertel, the President and CEO of the Nuclear Energy Institute testified. He stated that

> "One of the major difficulties stems from an unnecessarily narrow and restrictive reading of the original statutory language by the DOE Office of General Counsel. Section 1702(g)(2)(B) of Title XVII asserts that ''[t]he rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, shall be superior to the rights of any other person with respect to the property.'' The DOE Office of General Counsel has consistently misinterpreted this section as a prohibition on pari passu financing structures, and a requirement that the Secretary must have a first lien position on the entire project. Counsel for NEI and many of the project sponsors, with substantial experience in project finance, believe that Section 1702(g)(2)(B) gives the Secretary a ''superior right'' to the property he guarantees, not to the entire project."

On August 4, 2009, DOE proposed a revision[6] to its regulations that essentially agreed with the NEI's interpretation of the law, stating that

> "The Department has critically reexamined the statute, particularly its text and structure, and now concludes, as described below, that the interpretation of the statute requiring receipt of a first lien on all project assets is not one that it was legally compelled to adopt, and was not correct."

This view was roundly applauded by the nuclear industry. On September 22, 2009, Richard J. Meyers, the Vice President of Policy Development at NEI, submitted comments on DOE's proposed rule[7], stating that

> "NEI fully agrees with and supports the Department of Energy's new interpretation of Title XVII of the 2005 Energy Policy Act – i.e., that there is no legal requirement that Title XVII must be, or should be, construed as requiring a superior first priority lien on a project that receives a loan guarantee from the Department of Energy, and that Congress intended and expressly provided for the Secretary's discretion."

DOE's final rule was adopted on December 4, 2009, and included the interpretation of the subordination provisions that it had been urged to adopt by the nuclear industry.

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[5] http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=8a2243ed-1e87-41a2-95b0-11616080121f&Month=8&Year=2007

[6] https://lpo.energy.gov/wp-content/uploads/2010/09/Final_1703NOPR.pdf

[7] http://www.regulations.gov/#!docketDetail;D=DOE-2007-0002

I reiterate my request for hearings into the implementation of the nuclear power plant loan guarantee program, the issuance of the conditional nuclear loan guarantee that have been awarded, and the role the nuclear industry has had in altering the terms associated with subordination.

Sincerely,

Edward J. Markey

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